



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWK/169831

PRELIMINARY RECITALS

Pursuant to a petition filed November 3, 2015, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee County Disability Services Division-DSD in regard to Medical Assistance (MA)/CLTS Waiver service levels, a hearing was held on November 18, 2015, by telephone.

The issue for determination is whether the DSD correctly reduced the petitioner's CLTS-funded Daily Living Skills training below 44 hours monthly, effective November 1, 2015.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
By: [REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED], Disabilities Services Coordinator
Milwaukee Co. Disability Services Division-DSD
Attention: [REDACTED]-DSD
1220 W. Vliet Street, Suite 300
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.

2. The petitioner, age 15, resides in a home with his parents and siblings. He has been diagnosed with severe autism, and is nonverbal. The petitioner has communicative and cognitive delays that cause him to need one-on-one supervision constantly. He engages in severe, frequent destructive behavior. Examples of such behavior includes pulling apart electronics, pulling siding off of the garage and planks from a wood deck, ripping up clothes and bed sheets, and pulling a window wiper off of the family vehicle. He has escaped from school, and was found near train tracks once, and in a creek another time. The petitioner is ambulatory and has adequate gross motor skills; fine motor skills are delayed.
3. The petitioner would benefit from additional daily living skills training (DLST), but does not require personal care worker services. His mother is willing and able to provide assistance with the few personal care tasks for which the petitioner requires assistance. The family also requires some level of respite services, given the petitioner's behavior.
4. The petitioner's six-month service plan, developed in March 2015, awarded him 44 hours monthly of DLST, plus an amount of respite care not identified in this hearing record. There was also a belief by the parties that the petitioner would look into receiving behavioral improvement services from Dr. [REDACTED]. The petitioner does desire services from Dr. [REDACTED].
5. The March 2015 service plan expired October 31, 2015. The petitioner was proffered a new CLTS service plan on approximately October 8, 2015. The new six-month plan offered \$4,216 (17 days) for respite care and 25 hours monthly for DLST. A confusing notice, the *Prior Notification*, was issued to the petitioner on approximately October 5, 2015, implying that 44 hours monthly of DLST was requested, approval was uncertain, and that there might be a need for a personal care assessment before some services could be authorized. *See*, Petitioner's Exhibits 13, 14.
6. The petitioner underwent the personal care assessment approximately a week prior the hearing date. Post-hearing, this Judge was notified that the service plan was being changed, effective November 1, 2015, to include 44 hours weekly of DLST for November and December, and 40 hours monthly thereafter (presumably due to starting with Dr. [REDACTED]). The agency also agreed to approve services from Dr. [REDACTED] for nine hours weekly, for 16 weeks beginning January, 2016. This level of service, for 16 weeks, was recommended by Dr. [REDACTED]. *See*, Petitioner's Exhibit 18.

DISCUSSION

The CLTS program started in Wisconsin on January 1, 2004. Supported with MA funds, the CLTS program serves persons under the age of 22 who have a developmental disability, physical disability, or a severe emotional disturbance. The Wisconsin Department of Health Services released the *Medicaid Home and Community-Based Services Waivers Manual (Manual)* to assist in administering the CLTS program. *See*, online at <https://www.dhs.wisconsin.gov/waivermanual/index.htm>. The federal §1915(c) waiver document that allows this program is available at <http://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp>.

There is no dispute that the petitioner is eligible for the CLTS program. The local agency attempted to reduce his CLTS-funded services (DLST) effective November 1, 2015. No understandable or legally sufficient notice of DLST reduction was given, but the service plan signed on October 8 showed such a reduction. The petitioner has a right to appeal that service reduction via fair hearing. At hearing, the standard for decision is *de novo*, with the prevailing party providing the preponderance of the credible evidence.

I. NOTICE.

The local agency failed in its responsibility to issue a written service denial/reduction notice, with hearing rights. That responsibility is clearly accepted by the Department in its CLTS Waiver application document submitted to the federal government for approval:

Appendix F-1: Opportunity to Request a Fair Hearing

The State provides an opportunity to request a Fair Hearing under 42 CFR Part 431, Subpart E to individuals: (a) who are not given the choice of home and community-based services as an alternative to the institutional care specified in Item 1-F of the request; (b) are denied the service(s) of their choice or the provider(s) of their choice; or, (c) *whose services are denied, suspended, reduced or terminated*. The State provides notice of action as required in 42 CFR §431.210. *[emphasis added]*

Procedures for Offering Opportunity to Request a Fair Hearing. Describe how the individual (or his/her legal representative) is informed of the opportunity to request a fair hearing under 42 CFR Part 431, Subpart E. Specify the notice(s) that are used to offer individuals the opportunity to request a Fair Hearing. State laws, regulations, policies and notices referenced in the description are available to CMS upon request through the operating or Medicaid agency.

[Wisconsin's response]: Specific rights protect individuals applying for the CLTS waiver program, as well as children and families, or other legal representatives, participating in those programs. ... The Model Rights and Responsibilities Notification document (see below) details these rights and responsibilities. Parents, or other legal representatives, receive this document at application, upon service plan development and at least annually thereafter. Parents, or other legal representatives, also receive this document whenever eligibility or services are changed, reduced or denied. The Support and Service Coordinator has the additional obligation of explaining these rights and responsibilities and assuring that parents, or legal representative, as well as the child when appropriate, understand the information contained in the notification. The child and family, or legal representative, at initial application and annually each year thereafter sign the document. The child and family, or legal representative, receive a copy and the original signed document is in the child's file with the county waiver agency.

... If a child and family's services are terminated, reduced or changed, the Support and Service Coordinator also notifies the family verbally and in writing of their right to request a Fair Hearing. This notice details the denial or discontinuation of eligibility and provides specific information about the hearing request process, as well as relevant timelines and the effective date of the action taken. The notification clearly details the county's grievance and state appeals procedures. The information on the right to appeal includes the name and address of the Department of Administration, Division of Hearings and Appeals. The notice also informs the child and family of the right to contact the Long-Term Care Ombudsman Program and Disability Rights Wisconsin for assistance, including the toll-free numbers.

A county waiver agency may not take an adverse action on a CLTS waiver participant without giving the participant a ten-day notice of the action, as well as the appeal information previously noted. When informing a participant of his/her right to a state appeal, a county waiver agency must cite chapter 227 of State Statutes and 42 CFR Part 431, Subpart E. If the child has previously been determined eligible and is receiving services, then eligibility and services must continue pending an appeal, as long as the child and family, or legal representative, appeals the decision before the date of the adverse action stated in the notice letter. The County waiver agency retains original documentation of the adverse action and notification of the right to a Fair Hearing, with a copy sent to the Department of Health Services. ...

Appendix F-3: State Grievance/Complaint System

...

Description of System. Describe the grievance/complaint system, including: (a) the types of grievances/complaints that participants may register; (b) the process and timelines for addressing grievances/complaints; and, (c) the mechanisms that are used to resolve grievances/complaints. State laws, regulations, and policies referenced in the description are available to CMS upon request through the Medicaid agency or the operating agency (if applicable).

[*Wisconsin's response*]: Participants have the right to a Fair Hearing in response to any action take regarding their participation in the CLTS Waiver. Every CWA also has a local complaint/grievance process, and the participant or their guardian may choose to file a Fair Hearing, the local complaint/grievance process, or both, or neither, at any time. The Department's client rights publication, Client Rights and the Grievance Procedure for Community Services [is available online] ...

See, Waiver document 0414.R02.00, Appendix F.

The document above cross-references federal MA code language which requires that notice be given when MA services are reduced or terminated. 42 C.F.R. § 431.206(c). The code goes on to specify that the notice must declare what action the agency is taking (*e.g.*, reducing services), why it is happening (*e.g.*, failure to undergo a personal care screening), the rule/policy relied upon, the right to request a fair hearing, and the right to aid continuation pending appeal:

§431.210 content of notice.

A notice required under §431.206(c) ... must contain –

- (a) A statement of what action the State, ... intends to take;
- (b) The reasons for the intended action;
- (c) The specific regulations that support ... the action;
- (d) An explanation of –
 - (1) The individual's right to request ... a State agency [fair] hearing; ...
 - (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

Id., §431.210.

I have seen many examples of adequate service denial/reduction notices with appeal rights from other entities that run waiver programs; I do not understand why adequate written notice was not given here. The one notice that was coincidentally issued to the petitioner, the *Prior Notification*, was not even issued as a service reduction notice. The agency issued it as some sort of validation of a request for a service “exception or variance.”

II. MOOTNESS

The local agency asserted that it could not continue the petitioner's DLST at the ongoing level of 44 hours monthly because he had not undergone an assessment of his personal care worker needs. This assessment is different from and in addition to the "level of care" functional screen that must be done annually to maintain eligibility for CLTS participation. The petitioner's mother asserted that personal care services were unnecessary, and that she was uncomfortable lying about the potential of personal care services being engaged when she contacted screeners to perform such an assessment.

In any event, the petitioner underwent the (possibly unnecessary) personal care needs screening shortly before this hearing date. Post-hearing, the agency notified the petitioner and this Judge that the petitioner has been approved for his desired 44 hours monthly of DLST, as well as the recommended level of services with Dr. [REDACTED]. The enhanced DLST hours go back to November 1, 2015. Thus, there is no longer a denial/reduction in benefits issue for me to resolve regarding DLST and Dr. [REDACTED].

The petitioner's hearing request letter mentions a reduction in respite care hours, but does not specify the pre-November 2015 number of such hours. The petitioner's exhibits and the record do not tell me what the pre-November hours were. The service plan effective November 1, 2015, shows 17 days of respite care. The preponderance of the evidence does not establish that the petitioner's respite hours have been reduced in the new plan. Thus, there is no basis for me to issue conclusions of law or an order regarding the level of respite hours.

Due to the agency's post-hearing actions, there is no service reduction issue for me to decide at this time, and the appeal will be dismissed. Per this office's order, aid was continued at the prior level pending decision issuance. I did take the time to offer dicta regarding inadequate notice, because without adequate notice recipients are unlikely to seek state-level redress of incorrect local agency actions.

CONCLUSIONS OF LAW

1. The local agency did not provide the petitioner with legally sufficient written notice of the intended reduction of his DLST service hours to be effective November 1, 2015.
2. Because the local agency granted, post-hearing, the petitioner's requested level of DLST and behavioral (Dr. [REDACTED]) services, no issue remains for resolution by this Administrative Law Judge.

THEREFORE, it is

ORDERED

That the petition is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

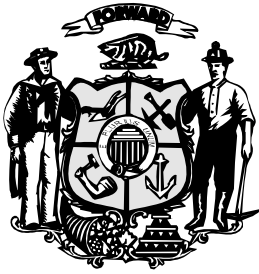
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 22nd day of January, 2016

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
MedCLTS



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 22, 2016.

Milwaukee Cty Disability Services Division-DSD

Bureau of Long-Term Support

Attorney [REDACTED] [REDACTED]